

Planning & Zoning Commission Meeting
Minutes of May 5, 2010
1st Floor North Conference Room - City Hall

Present: Chair Cindy Weeks; Vice-Chair Darryl Hart; Mark C. Brooks, Jerome Jones, Mark Sexton and Holly Shriner

Absent: Nathaniel Cannady

Pre-Meeting - 4:30 p.m.

Planning & Development Director Judy Daniel handed out a spread sheet to the Commission members identifying active long-range planning initiatives and research requests along with the proposed timelines for completion. The Commission had a few questions about these items and also discussed their interest in working on policy related matters in the upcoming year.

Regular Meeting - 5:00 p.m.

Chair Weeks called the meeting to order at 5:00 p.m. and informed the audience of the public hearing process.

Administrative

- ? Chair Weeks was pleased to welcome new Commissioner Holly Shriner
- ? Mr. Jones moved to approve the minutes of the April 7, 2010, meeting. This motion was seconded by Mr. Hart and carried unanimously by a 6-0 vote.

Agenda Items

- (1) Consideration of the initial zoning of recently annexed property located on 97 Underwood Road to Highway Business District. The property is identified as PIN 9643.81-4997 in the Buncombe County tax maps and records.**

Urban Planner Julia Cogburn said that the City of Asheville recently completed the voluntary annexation (effective April 30, 2010) of a 1.96 acre tract located at 97 Underwood Road in Southern Buncombe County. The property is located to the west of the Asheville Regional Airport and is adjacent to I-26. Access to the property is off of Underwood Road. A single building (warehouse) is located on the site which previously housed a rental facility.

The property is currently unzoned and is surrounded by unzoned property. The Airport property is zoned Institutional but other properties along Airport Road that are in the City's corporate limits are zoned Highway Business (HB). Staff proposes HB zoning for this parcel.

Pro:

- ? Zones property recently taken into the City of Asheville in consideration of the surrounding zoning and land use and the City's comprehensive plan.

Con:

- ? None noted.

Based on the above findings and the analysis provided in the report, staff finds this request to be reasonable.

Chair Weeks opened the public hearing at 5:05 p.m. and when no one spoke, she then closed it at 5:05 p.m.

Based on the above findings and the analysis provided in the report, Mr. Jones moved to recommend approval of the zoning map amendment to initially zone 97 Underwood Road Highway Business. This motion was seconded by Mr. Brooks and carried unanimously on a 6-0 vote.

(2) Consideration of amending Chapter 7 of the Unified Development Ordinance to establish electronic gaming operations as a new use-by-right, subject to special requirements.

Assistant Director of Planning & Development Shannon Tuch said that this is the consideration of an amendment to Chapter 7 of the Code of Ordinances to add a new land use designation for Electronic Gaming Operations (EGO) and establish special standards for their review and regulation.

In 2006, the State of North Carolina adopted legislation that banned video poker and other gaming machines across the state and all machines were phased out by July 1, 2007. Proponents for the video gaming industry responded by adapting machines allowing them to fall under a special provision that allowed the NC State Education Lottery and other sweepstakes games made popular by national food chains (McDonald's, Pepsi Co., etc.). Since then, there have been several legislative attempts to ban or restrict EGOs, but at least two superior (lower) courts have held that the new forms of the games are not covered by the law, and have enjoined its enforcement. There has been no ruling from an appellate court, and the validity of the State law remains uncertain.

In the absence of criminal enforcement measures, numerous municipalities are responding and controlling the proliferation of these businesses through various controls, the most common of which includes the adoption of a Conditional Use or Special Permit process and/or the adoption of a new privilege license fee designed to reflect the profitability of the machines. The Unified Development Ordinance (UDO) is structured such that a use that is not specifically allowed in a zoning district—as a use by right, subject to special requirements, or conditional use—is not permitted. In the River District, however, all uses are allowed unless specifically prohibited. Currently, the City does not define or regulate EGOs. As a result of this absence of regulation, several EGOs have attempted to locate in commercial districts in the City, under the umbrella of similar uses, such as “recreational uses, commercial indoor.” At least one EGO has opened in the River District, but is subject to no regulations regarding its operation (parking spaces, etc.). Approximately ten (10) separate businesses have been established without permits and have been issued Notices of Violation. Most have complied and ceased their activity awaiting the adoption of new standards; however, several businesses have chosen to remain open after being cited for failing to comply and are currently accruing a \$100 per day fine that will continue until compliance is achieved or, the use is ceased. Recently, the Board of Adjustment ruled that EGOs were not encompassed within the use classification of “recreational uses, commercial indoor,” which is a permitted use in several districts, and upheld a notice of violation. Part of the basis for that ruling was that EGOs had the potential for substantial cash payouts, and their customers are limited to adults over the age of 18, which is a substantially different kind of business than the family-oriented establishments that typical of that use classification. In view of the regulatory uncertainty at the State and local levels, the need for some consideration as to whether and how to regulate EGOs is apparent. Local governments across the State are confronted with this same issue

After conducting a review of common practices, both locally and across the state, the City of Asheville staff feels that a reasonable response would be to pursue two separate actions.

- 1) Amend the City's code of ordinances to create a new business designation and some appropriate controls to help mitigate any potential impacts from the businesses, and
- 2) Adopt a new privilege license fee specific to these uses and consistent with other local municipalities.

The first action noted above would require an amendment to the City's UDO and review by the Planning & Zoning Commission and City Council.

City staff proposes to add the new land use designation to a number of commercial zoning districts that currently allow uses of similar impacts. While most other local governments that have adopted standards have permitted EGO's through a Conditional Use or Special Use permit process requiring approval by the elected officials, Asheville staff proposes to allow the new use as a Use by right, Subject to special requirements. This would streamline the review process while still maintaining a high level of review.

After reviewing numerous ordinances from other cities and towns, the most common elements of the newly adopted ordinances include:

- 1) A new, or expanded, or clarified definition
- 2) A limit on the total number of machines
- 3) A limit on the hours of operation
- 4) A separation requirement from:
 - ? Residences
 - ? Other gaming establishments
 - ? Adult establishments
 - ? Places of worship
 - ? Parks, playgrounds, ballfields
 - ? Daycare centers, daycare homes
 - ? Schools
 - ? Libraries
 - ? Child or family venues (i.e. children's theaters, video arcades, etc.)

The ordinance proposes standards that the staff believes are appropriate for the Asheville community that would allow the freedom to pursue this new business opportunity while also providing for the necessary controls to mitigate any potential land use conflict or public safety concerns.

She stated that the proposed new definition would be:

Electronic Gaming Operation means a business enterprise, whether principal or ancillary, where persons utilize electronic machines, including but not limited to computers and gaming terminals, to conduct games including but not limited to, sweepstakes, lotteries, games and/or games of chance where cash, merchandise, or other items of value are redeemed or otherwise distributed, whether or not value of such distribution is determined by electronic games played or be predetermined odds which have a finite pool of winners. This term includes, but is not limited to internet cafes, internet sweepstakes, or cybercafés. Electronic Gaming Operations do not include operations associated with the official NC State Education Lottery or any nonprofit operation that is otherwise lawful under State law (for example, church or civic organization fundraisers) nor shall it include arcade games of skill.

She then explained the rationale for the following proposed new standards:

"Electronic gaming operations.

- a. Use districts: Highway Business, Regional Business, Central Business District, River, Commercial Industrial.
- b. Electronic gaming operations, whether ancillary or primary, with five or more machines shall comply with the following separation requirements:
 - ? 1000 feet from all other electronic gaming operations and adult establishments
 - ? 1000 feet from schools, libraries, places of worship, child care centers, public parks/playgrounds, public recreation or community center
 - ? 500 feet from all residentially zoned properties
 - ? 200 feet from all non-residentially zoned properties occupied by structures that include residential uses
- c. Electronic gaming operations, whether ancillary or primary, with four or fewer machines shall comply with the following separation requirements:
 - ? 500 feet from all other electronic gaming operations and adult establishments
 - ? 200 feet from schools, libraries, places of worship, child care centers, public parks/playgrounds, public recreation or community center
 - ? 100 feet from all residentially zoned properties
 - ? 50 feet from any non-residentially zoned property occupied by structures that include residential uses
- d. For the purposes of this subsection, the distance shall be measured from the closest point of the outer wall of the structure housing the electronic gaming operation to the nearest property line occupied by a protected use, zone, or by any other electronic gaming operation or adult establishment.
- e. The Board of Adjustment may consider variances to the development standards found in articles VIII and XI. Variances to separation requirements may only be considered when major geological landforms, limited access highways, or other features that create a substantial divide separate the uses.
- f. No electronic gaming operation shall not engage in business prior to 10 a.m. or after 10 p.m. Monday through Saturday and, not prior to 1 p.m. or after 10 p.m. on Sunday. During hours of operation, electronic gaming operations shall be open for direct, unobstructed access by all safety and enforcement personnel. All entrance doors shall remain unlocked while patrons are on the premises. All electronic gaming terminals/machines/computers/gaming stations shall be open and visible from the exterior of the exterior front of the establishment.
- g. No person or entity engaged in electronic gaming operations shall allow, permit, or condone any person under the age of 18 to engage or play any game that is included in the definition electronic gaming operations.
- h. The maximum number of gaming terminals/machines/computers/gaming stations within an electronic gaming establishment is twenty (20).
- i. Any electronic gaming establishment existing prior to the effective date of this ordinance shall comply with the regulations contained within this subsection within 180 days after the effective date of this Ordinance Electronic gaming operations are prohibited in or as a part of any check cashing facility.
- j. The machines/terminals must not be prohibited by the State or Federal law and must have all applicable State and local permits and business licenses prior to the opening of the business.
- k. If food and/or beverages are served, the establishment must meet any State requirements and the requirements of the Buncombe County Health Department."

The proposed use does not align with stated goals or plans, predominately because it addresses a use intended to be prohibited that is now proliferating due to a judicial interpretation and, therefore, not considered when goals and plans were discussed and adopted. Regulating

the use could, help control secondary impacts associated with criminal activity, nuisance complaints and other land use conflicts.

Pro:

- ? Regulates a new business that has judicially been interpreted as a legal use

Con:

- ? Could eventually be "re-prohibited" by the State of North Carolina General Assembly (although it is unlikely to be taken up during the ensuing short session)
- ? Would require additional review and enforcement responsibilities when limited resources are available to accommodate new work
- ? May result in unanticipated impacts and concerns from citizen groups

In February/March 2009, this proposal was reviewed by: (1) The Planning & Economic Development Committee; (2) The Finance Committee, and (3) The Public Safety Committee

In all cases, the three committees recommended moving this proposal forward to the Planning & Zoning Commission and City Council for consideration.

Staff recommends adoption of the Ordinance proposed that establishes a new land use designation and associated land use controls.

Should the Commission choose not to support this proposal or wish to consider other policy options a few alternatives could include:

- ? Adopt a new definition for *Electronic Gaming Establishments* and then adding them to the list of permitted uses in appropriate zoning districts. (not recommended)
- ? Create a new Conditional Use Permit category for *Electronic Gaming Establishments*.
- ? Expressly prohibiting *Electronic Gaming Establishments* in the City of Asheville.

In response to Mr. Jones, Ms. Tuch expanded her explanation of the legislation that banned video poker and other gaming machines across the state.

When Mr. Brooks questions why the separation standards applied to other gaming operations or adult establishments, Ms. Tuch said that it's not unusual for those types of businesses to congregate and then you start to get a "red light district."

In response to Mr. Brooks, Ms. Tuch said that if an existing convenience store wants to add three machines they would need to go to the City's permit center and get the necessary applications. The Planning Department would then review the application to make sure it meets these standards, with some other necessary departments reviewing the application as well.

Ms. Tuch responded to Mr. Brooks when he questioned the Police Department's enforcement of the hours of operation.

In response to Mr. Hart, Ms. Tuch said that existing electronic gaming establishments have 180 days to come in and apply for a permit. If they cannot meet those standards, then they have 180 days to get rid of the machines.

Ms. Tuch responded to Chair Weeks regarding the separation requirements regarding residentially zoned properties.

Chair Weeks opened the public hearing at 5:28 p.m. and when no one spoke, she then closed it at 5:28 p.m.

Ms. Shriner was concerned that a lot of electronic gaming operations might be established in the downtown area and wondered if we could amend the ordinance to make them Conditional Use Permits in the Central Business District. After a brief discussion, it was felt that the separation requirements should eliminate that concern and if not, then the ordinance can be amended.

Based on the above findings and the analysis provided in the report, Mr. Sexton moved to recommend approval of the amendment to Chapter 7 of the Unified Development Ordinance establishing electronic gaming operations as a new use-by-right, subject to special requirements. This motion was seconded by Mr. Jones and carried unanimously on a 6-0 vote.

(3) Consideration of amending Chapter 7 of the Unified Development Ordinance for the purpose of correcting codification errors and resolving discrepancies in the uses between different sections of the Unified Development Ordinance.

Assistant Planning & Development Director Shannon Tuch said that this is the consideration of amendments to Chapter 7 of the Code of Ordinances of the City of Asheville (Unified Development Ordinance) for the purposes of correcting Municipal Code codification errors and resolving discrepancies in uses between different sections of the Unified Development Ordinance (UDO).

The Planning & Development staff has been meeting regularly over the past 3 months to evaluate the UDO for consideration of consolidating permitted land uses into a comprehensive "Table of Uses" to add to the UDO. This evaluation has also identified a number of discrepancies and errors revealed when cross-referencing the list of "Permitted uses" and "Uses by Right Subject to Special Requirements", outlined in Article VIII, General Use Districts, to the uses identified in Article XVI, Uses by Right, Subject to Special Requirements and Conditional Uses.

This report proposes changes to correct these discrepancies and errors as a first step in the process of creating the consolidated table of permitted uses, and will provide a clearer document for the staff and the public to use.

This ordinance supports the Council goal of completing UDO amendments to improve clarity and address community goals.

Pros:

- ? Corrects discrepancies and codification errors.
- ? Provides consistent language and terminology for all uses listed throughout the UDO.
- ? Provides a "clean and consistent" template and text for creating a comprehensive "Table of Uses" document.

Cons:

- ? None Noted.

The Planning and Development Department staff recommends approval of these wording amendments.

Chair Weeks opened the public hearing at 5:40 p.m. and when no one spoke, she then closed it at 5:40 p.m.

Based on the above findings and the analysis provided in the report, Ms. Shriner moved to recommend approval of the amendment to Chapter 7 of the Unified Development Ordinance for the purpose of correcting codification errors and resolving discrepancies in the uses between

different sections of the Unified Development Ordinance. This motion was seconded by Mr. Sexton and carried unanimously on a 6-0 vote.

Other Business

Mr. Mike Summey said that he missed the public hearing on the zoning of 97 Underwood Road due to traffic and asked the Commission to re-open the public hearing, allow his comments, and table the issue until staff can obtain more information on what is planned for that property. In summary, he explained that he has a \$40 Million proposed project (11-story twin-tower office complex that could be split for two companies) in close proximity to this property and has heard from a neighbor that the property owner plans to put in a strip club which will detrimentally impact his project. Assistant Director of Planning & Development Shannon Tuch said that the Highway Business District would allow an adult establishment, but it would be a conditional use and require a Conditional Use Permit. Additionally, special standards include a 1,000 foot separation from churches, schools, libraries, etc. as well as residential districts. A strip club could not establish on that property if it is within 1,000 feet of a church or a residential zoned property. A bar would not have the same restrictions, but an adult establishment would. After a brief discussion, it was understood that the Planning & Zoning Commission makes recommendations only to City Council and Mr. Summey would have an opportunity to express his concerns to City Council at their public hearing. In addition, between now and the time the City Council public hearing is held, City staff will have the opportunity to meet with Mr. Summey and the property owner to discuss the potential concern.

Chair Weeks announced an Ethics webinar on May 20, 2010, at 4:00 p.m. in the Fifth Floor Conference Room in the City Hall Building.

Adjournment

At 6:06 p.m., Mr. Jones moved to adjourn the meeting. This motion was seconded by Mr. Sexton and carried unanimously by 6-0 vote.